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In the Supreme Court of the United States

OCTOBER TERM, 1997

JAMES W. CILECEK, M.D.,
Petitioner,

v.

INOVA HEALTH SYSTEM SERVICES, JOAN MILES, R.N., EMERGENCY PHYSICIANS of NORTHERN VIRGINIA, Ltd. and THOM A. MAYER, M.D.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY MEMORANDUM

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REASONS FOR GRANTING THE PETITION

Respondents' main theme is that the Fourth Circuit merely applied settled law in holding that Dr. Cilecek was an independent contractor, and not an employee. However, the United States and the Equal Employment Opportunity Commission have taken the opposite position in this case. They argued, in support of rehearing below, that the majority's decision "failed to properly apply" the rule set forth in this Court's decision in *Darden v. Nationwide Mutual Insurance Co.*, 510 U.S. 318 (1992): that the "primary factor" in determining employee status is the hiring party's right

to control the manner and means by which the hired individual performs the work. (Amicus Brief on Rehearing at 2.) They also argued that "this case is exceptionally important," and that it "will have significant negative implications for the increasing number of professionals who like Dr. Cilecek might be labeled 'independent contractors,' but are, as a matter of workplace reality, 'employees.'" (*Id.* at 6.) Likewise, *amici curiae*, The Women's Legal Defense Fund, The National Employment Law Project, The National Women's Law Center, and The Service Employees International Union, AFL-CIO, argue in this Court that the outcome of this case "will determine whether federal civil rights protections will extend to large numbers of workers who are mislabeled as 'independent contractors' while actually functioning as employees." (Amici Brief at 2.)

Respondents' brief in opposition has no answer for petitioner's contentions that the decision below (1) erroneously eliminates the important factor of "the hiring party's right to control the manner and means by which the [work] is accomplished"[1] and contravenes settled law that the label given to the worker is not controlling; (2) conflicts with the recent decisions of the Ninth and Eleventh Circuits; and (3) will have far-reaching implications beyond the range of Title VII and emergency physicians. Indeed, respondents merely repeat the stated basis for the Fourth Circuit's decision, with all of its flaws and inaccuracies. In these circumstances, the case clearly presents an issue that fully warrants this Court's review. Respondents' brief

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1 *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323 (1992).

in opposition raises only a few points that merit brief response.

1. Respondents make much of the fact that the Fourth Circuit purported to consider the "traditional factors" pertinent to employment status. (Opposition at 7-9.) However, although the Fourth Circuit claimed to apply the *Darden* test, it virtually eliminated the most significant factor under that test: whether the hiring party exercises control over the work of the hired party. Respondents argue that the "traditional factors" must be considered "within the context of hospital-based, emergency room medical care." (Opposition at 7-8.) The admittedly pervasive control exercised over emergency room doctors should be discounted, respondents argue, or else "all physicians who treat patients at the hospital would be hospital employees." (Opposition at 11.)

There are two answers to that argument. First, if more doctors are classified as employees as a result, that is a function of the hospital exercising employer-type control over them. It cannot maintain such control over the everyday work, function like an employer, and still disclaim the obligations of employer. Second, there are many facets of control; whether a doctor who has privileges at the hospital but is not fully integrated into the workforce, as Dr. Cilecek was, is sufficiently controlled to be an "employee" is a question for the factfinder. Each situation must be judged on its own facts. If Respondents' result-oriented approach were correct, any court could refashion the test and vary the importance of the "control" factor to achieve the result it wanted to achieve. Most importantly, Respondents make Petitioner's argument: in holding that control is less important in the context of the medical profession,

the Fourth Circuit's decision deviates radically from the decisions of this Court and numerous circuit courts that have held that ***the "control" exercised by the hiring individual is the crucial factor***. (*See* cases cited in Petition at 17, n.11.)

It is precisely because employers must exercise more control over "employees" than "independent contractors" that the indicia of "control" are so important to the question of employment status. Other courts considering this issue in the context of the medical profession have recognized this and have not modified the *Darden* test to avoid finding "employee" status. *See, e.g., Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256, 1266 (11th Cir. 1997) (in examining whether an emergency physician was an 'employee' or an 'independent contractor,' "the central issue . . . is the 'hiring party's right to control the manner and means by which the [work] is accomplished'") (quoting *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1492, 1495-96 (11th Cir. 1993), citing *Community for Creative Non-Violence v. Reid*, 409 U.S. 730, 751 (1989)).

2. Dr. Cilecek has never denied that he agreed to be called an independent contractor, and that he paid his taxes accordingly. Respondents, like the court of appeals, elevate his acquiescence to almost a legally binding admission. They repeatedly refer to his "admission" and his testimony "under oath." (Opposition at 8-10.) But the law is clear that even if the parties had a written contract that declared him an independent contractor, and intended to establish that status, that contract would not govern if, as a matter of workplace reality, the worker functioned like an employee, and the company exercised pervasive, employer-type control over the work. Our petition

cites numerous circuit court decisions holding that the label given to the hired individual does not control. (*See* Petition at 13, n.8 and 15, n.9.) Indeed, those cases make clear that protection under federal remedial statutes, such as Title VII, cannot even be waived. Respondents do not attempt to distinguish any of these cases.

Instead, Respondents simply recite a few factors that they say weighed in favor of independent contractor status. Respondents miss the point entirely. First, they do not address Petitioner's argument that the Fourth Circuit improperly weighed the factors contained in the limited record.[2] Second, in emphasizing the "parties' intent" to create an independent contractor relationship, Respondents, like the Fourth Circuit, erroneously focus solely on the "label" applied by the parties, and ignore the other factors, especially that of control. One need only look at the recited factors to see that either they do not demonstrate independent contractor status, or that the "fact" was disputed and must be read to favor Dr. Cilecek. It was undisputed that Dr. Cilecek worked full time and exclusively for respondents for many years;[3]

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[2] Respondents' argument that Dr. Cilecek failed to preserve any claim that he was denied discovery is specious. (Opposition at 12-13.) The Fourth Circuit did not consider Respondents' argument, and Respondents' argument was not a basis for its decision. The crucial point that Respondents avoid addressing is that the Fourth Circuit improperly weighed the facts in favor of the moving party in contravention of this Court's well-established principle that all inferences must be weighed in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1968).

[3] Respondents argue that Dr. Cilecek was free to work for others. (Opposition at 8.) They fail to state, however, that Dr.

like all emergency room doctors, he proposed a work schedule, which was approved or altered by the hospital; he was paid an hourly rate, like many employees are; he received the employee benefit of malpractice insurance. He did work without close oversight in the exercise of his medical judgment, which was true of all doctors, both "employees" and "independent contractors." In sum, when the Fourth Circuit affirmed summary judgment for defendants before discovery was complete, in the face of the above facts, it gave dispositive effect to the parties' "agreement" that Dr. Cilecek would be called an "independent contractor."

3. One of the most important reasons for granting review in this case is to resolve the conflict between the decision below and the recent decisions of the Ninth and Eleventh Circuits. Respondents' attempts to explain the conflict away are unconvincing.

- *Vizcaino v. Microsoft Corp.*

The brief in opposition devotes a few sentences to the differences between the facts of the decision below and the facts of *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997). (Opposition at 14.) It states, without citation, that "the Ninth Circuit relied heavily on Microsoft's admission as to their employee status." (Opposition at 14.) In fact, regarding Microsoft's "admission," which occurred after the IRS determined that the workers in question were in fact employees, the Ninth Circuit explicitly stated that the concession

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Cilecek had been working full time and exclusively for Respondents for 2 years at the time he was fired (Petition at 3), and they do not explain why this is relevant in any event.

would, "at first blush, appear to dispose of this case. ...If that were all, this would be an exceedingly easy case. Of course, that is not all." *Vizcaino v. Microsoft Corp.*, 120 F.3d at 1010.

The Ninth Circuit painstakingly examined the written agreements between Microsoft and the workers in order to determine whether Microsoft intentionally labeled the workers 'independent contractors' in order to avoid its obligations under federal law or whether the label was a mistake. *Id.* at 1011. These agreements, far more explicit than any understanding between Dr. Cilecek and respondents, explicitly provided that the worker was "'an Independent Contractor for [Microsoft],' and nothing in the agreement should be construed as creating an 'employer-employee relationship.'" *Id.* at 1010. The Ninth Circuit held that, notwithstanding the contractual intent *not* to create an employment relationship, the "Workers performed services for Microsoft **under conditions which made them employees**." *Id.* at 1012 (emphasis added). The same is true of Dr. Cilecek.

- *Garcia v. Copenhaver, Bell & Assoc., M.D.'s, P.A.*

Respondents' attempts to explain away *Garcia v. Copenhaver, Bell & Assoc., M.D.'s, P.A.*, 104 F.3d 1256 (11th Cir. 1997), are similarly unavailing. In attempting to distinguish the case, which also involved an emergency room doctor, they claim that "unlike Dr. Cilecek, Dr. Garcia did not specifically bargain for independent contractor status, did not admit under oath that he intended to be and was an independent contractor and did not work for other emergency medical facilities . . ." (Opposition at 14.) This attempt ignores completely that the contract between Dr. Garcia

and the hospital explicitly provided that he was to perform his duties "as an independent contractor and not as an employee," and that the corporation was to exercise no control over the manner and means in which he performed his duties, which were to be performed in accordance with his "independent medical judgment." *Garcia*, 104 F.3d at 1258. For the Eleventh Circuit, unlike the Fourth Circuit, the explicit intent of the parties is not sufficient to establish independent contractor status. The workplace realities will control.

4. Finally, Respondents attempt to dismiss the negative impact that the Fourth Circuit's decision will have on the Internal Revenue Service (Opposition at 15-16), but notably they ignore the fact that the IRS defines physicians who are fully integrated into the hospital workforce as employees. (Petition at 22, n.17); *see also James v. Commissioner*, 25 T.C. 1296, 1301 (1956) (holding that a hospital pathologist was an employee because he was subject to the "general control of the hospitals" over his work and the "controls over his method of working" required by his profession).[4]

Respondents' argument that Title VII's coverage will not be adversely affected because independent contractors have always been excluded from coverage,

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[4] The impact may be far broader with the increasing practice of contracting out segments of traditional medical care. Questions of Medicare billing by suppliers of medical care arise, and the suppliers of medical care who misclassify emergency physicians as "independent contractors" may be liable for fraudulent billing of Medicare under 42 C.F.R. § 424.80 (1997). This is an issue of great importance to the Health Care Financing Administration, among others.

of course begs the question. (Opposition at 15.) As petitioner, the United States and the EEOC, and *amici* have argued, the Fourth Circuit's decision will make it far easier to establish independent contractor status, which employers have every incentive to do. Unquestionably, such license given to covered employers will adversely affect workers who have heretofore been entitled to protection under a variety of federal remedial and revenue statutes.

Directly responding to the dangers posed to the changing American workforce, the EEOC on December 8, 1997, announced that it had expanded its guidelines on the applicability of federal civil rights laws to cover contingent or temporary workers who contract with employment agencies, large percentages of whom are women and minorities. *See* 1997 Daily Exec. Rep. (BNA) 236, A-21, A-22 (December 9, 1997). Under these guidelines, as long as both the employment agency and the employer that contracts with the employment agency for services have control over a worker and employ the statutory minimum number of workers, they are both liable for violations of the federal civil rights laws as joint employers. *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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